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No. 98-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, EX REL., PAUL BIDDLE,
Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Stanford's Brief in Opposition misstates the law and the facts in several respects and inappropriately minimizes the import of the Ninth Circuit's decision in this case.

I. The Government Did Not Vindicate Stanford

Stanford's assertion that it "has repeatedly been vindicated by the government regarding Biddle's allegations of fraud," *see* Op. Br. at 4, is irrelevant, patently false, and a mischaracterization of the Government's actions in this case. As an initial matter, Stanford's cries of vindication have absolutely no bearing on the merits of the issue before this Court. The district court deprived Biddle of any opportunity to present his evidence on the merits of the false claims as a result of its ruling on subject matter jurisdiction. Thus, Stanford's "vindication," or lack thereof, has yet to be adjudicated by any court of law.

In any event, the fact that the Government chose not to intervene in this action but instead elected to allow Biddle to prosecute the FCA claims does not at all mean that the Government found Stanford to be without fault or free of liability for its years of overcharges. *See* 31 U.S.C. § 3730(b)(4)(B). Indeed, in its Notice Declining Intervention (cited by Stanford as CR 42) the Government requested that the Complaint be unsealed and served on Stanford and not be "dismissed, settled, or otherwise discontinued" without the written consent of the Attorney General (which was never obtained). Further, the Government explicitly reserved its right to "intervene in this action at a later date." Had the Government found Biddle's suit to lack merit, the Government would have filed a motion to dismiss the action. *See* 31 U.S.C. § 3730(c)(2)(A). Allowing Biddle's suit to continue, however, furthered the express purpose of the FCA – to encourage individuals to expend private resources to collect defrauded funds when the Government's resources are stretched too thin. *See United States ex rel. Findley v. FPC-Boron Employees'*

Club, 105 F.3d 675, 679 (D.C. Cir. 1997) ("[t]he *qui tam* provisions offset inadequate law enforcement resources").

Stanford's assertion that the Office of Naval Research ("ONR") "did not find any fraud," Op. Br. at 4, is a gross misrepresentation as shown by the very ONR documents cited by Stanford which state:

> [T]there appears to be some validity to [Biddle's] concern that the Government has overpaid Stanford for indirect costs during the period 1980-1989 . . . .

ER 226, Ex. D at p. 59 ("Report of Inquiry Into Stanford University Overhead Rates" dated Jan. 19, 1991).

> The government audited the rates and costs in question. * * * These audits produced a potential $185 million in questionable charges to the government.

ER 226, Ex. B at B-S 1429-30 (ONR News Release dated Oct. 1994).

Indeed, as part of ONR's settlement of Stanford's "contract" claims against the Government, Stanford returned $1.2 million to the Government—hardly a vindication of Stanford. As part of that settlement, the ONR issued the above quoted press release noting that the audits had disclosed "questionable charges" but that the Government "[did] not have a claim [of] . . . fraud" against Stanford. The statement that ONR "did not have a claim" of fraud following the settlement does not mean that Stanford had not made false claims prior to the settlement of the contract claims.

Stanford's claim that the Defense Contracting Audit Agency ("DCAA") "did not find any fraud," Op. Br. at 4, also is blatantly false and flies in the face of a 1993 DCAA audit report that states:

> As you know, previous audits of Stanford's indirect cost submissions lead us to conclude that Stanford has overbilled the government about $230,000,000 for prior year indirect costs not appropriately allocable to government work.

CR 185, Ex. B at 3.[1]

These audits led to a $20 million per year reduction of Stanford's recovery of indirect costs from the Government. Stanford has in no way been vindicated for its fraudulent pattern of overcharging the Government.

II. Stanford Misstates The Current Law On The FCA's "Based Upon" Language And Misconstrues Biddle's Interpretation Of That Language

Stanford erroneously asserts that there is no split in the circuits on the meaning of "based upon" in the FCA and misconstrues Biddle's argument regarding the meaning of that language.

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[1] Stanford's citation to CR 1, Ex. C for the proposition that DCAA "did not find any fraud" is completely unsupported by the cited DCAA document, which states that all agreements between Stanford and ONR should be terminated because they "often result in reimbursement above and beyond that contemplated . . .and are not considered to be in the government's best interests." CR 1, Ex. C. Nowhere does DCAA state that it "did not find any fraud" as Stanford asserts.

A. The Ninth Circuit's Interpretation Of "Based Upon" Is Not "Consistent With The Decision Of Every Circuit" – A Split Of Authorities Continues To Exist Five Years After It Began

The fact that other circuits have considered the Fourth Circuit's interpretation of "based upon" and rejected it does not mean, as Stanford suggests, that a circuit split does not exist. *See* Op. Br. at 10. It is precisely because of these conflicting decisions that a split in the circuits exists which requires this Court's attention.

Although Stanford is correct that the majority of circuits interpret "based upon" to mean "same as," *see* Op. Br. at 10-11; Pet. at 12, this fact alone does not make the majority rule correct nor does it make the conflict any less problematic or the effect on *qui tam* relators any less harsh. Such a split in authorities also encourages forum shopping as *qui tam* relators search for a jurisdiction that will be friendly to a private FCA suit.

B. Biddle's Interpretation Of "Based Upon" Gives Effect To All Parts Of The FCA While The Ninth Circuit's Interpretation Does Not

Contrary to Stanford's assertions, Biddle's interpretation of the FCA does not render the original source inquiry surplusage. *See* Op. Br. at 12-13. As Biddle and Stanford agree, the 1986 amendments to the FCA were designed to encourage more private enforcement suits and discourage parasitic ones. *See* Pet. at 15; Op. Br. at 14. The three-part test of the public disclosure bar is intended to eliminate parasitic suits before they begin. The first prong of the test asks whether or not the FCA action before the court is based, in any part, upon public information. *See* 31 U.S.C. § 3730(e)(4)(A). If the complaint contains such public information in whole or in part, the relator must then demonstrate that he contributed valuable independent

information to the complaint consistent with the purposes of the FCA. *See* Pet. at 11-12.

In contrast, if the complaint is based entirely upon information which the relator himself uncovered, the relator should not have to prove that he has direct and independent knowledge of the allegations or that his disclosure to the Government was voluntary because the complaint is in no way parasitic. Thus, only in a case such as Biddle's where the relator's information is entirely derived from his own efforts, is the second part of the public disclosure bar inapplicable. In every other case, where information in the complaint is derived from public disclosures in any way, the relator must then demonstrate his direct and independent knowledge and his voluntary disclosure to the Government.

In contrast, Stanford's and the Ninth Circuit's interpretation of the words "based upon" renders those words meaningless in every case. This is so because the public disclosure bar of the FCA is raised only if information in the complaint is already in the public domain. Once information of the allegations of fraud are in the public domain, however, the Ninth Circuit has answered the first question of the public disclosure bar before the question is ever asked. If the fraud allegations are already in the public domain, the information in the complaint is automatically "the same as" or "based upon" those public disclosures. Thus, if Stanford and the Ninth Circuit are correct, the words "based upon" have no meaning whatsoever in any FCA action.

III. As Respondent Concedes, The Purpose Of The 1986 Amendments To The FCA Was To Encourage More Private Enforcement Suits And Allowing Biddle's Suit To Go Forward Furthers That Purpose

As Stanford repeatedly states, the 1986 amendments to the FCA were intended to "enhance" recovery of fraudulently obtained Government funds, to increase incentives for private FCA actions, and to "encourage more private enforcement

suits." Op. Br. at 14-16. Yet, Stanford inexplicably asserts that allowing Biddle's action somehow defeats these purposes.

Stanford suggests that the Government "could and should" bring such suits itself. Op. Br. at 14. This, of course, would be axiomatic if the Government had unlimited resources. But it does not. Stanford itself acknowledges that a "coordinated effort" between the Government and private citizens is essential to carrying out the FCA's mandate. *Id.* (citations omitted). Further, the suggestion that the Government could have successfully prosecuted this civil action without Biddle ignores the essential nature of the information *provided by* Biddle.

Finally, the suggestion by Stanford that Biddle is no longer a private citizen because he worked for the Government rather than for a private entity is patently absurd. The legislative history cited by Stanford states that the purpose of amending the FCA was to "encourage more private enforcement suits." Op. Br. at 16 (citations omitted). This legislative history does not differentiate between relators on the basis of their employment status. Government employees are private citizens.

IV. The Regulations Cited By Stanford Did Not Render Biddle's Disclosures To His Superiors And To Congress Involuntary

The Federal Acquisition Regulations ("FAR") and the Navy Acquisition Procedures Supplement ("NAPS"), which Stanford relies upon so extensively, *see* Op. Br. at 5-6, require only that Biddle *refer* fraud to the appropriate authorities *if he sees fraud*. The FAR and NAPS do not require Biddle to seek out fraud or to investigate fraud when he finds it nor do they require Biddle to conduct an audit of Stanford's conduct. The regulations merely require that contracting officers "safeguard[] the interests of the United States," FAR, 48 C.F.R. § 1.602-2, and "refer" instances of possible fraud "to the Navy Inspector General for review or the conducting of an

investigation." NAPS, 48 C.F.R. § 33.209. Nothing about any of the regulations cited by Stanford makes Biddle's whistleblowing involuntary. In particular, no regulation cited by Stanford compelled Biddle to "uncover and disclose fraud," Op. Br. at 8, or to investigate such fraud and report it to higher levels of Government when his supervisors opted to turn a blind eye.

Similarly, despite the weight Stanford gives Biddle's memorandum reciting his job responsibilities, the memorandum has no legal significance. Because Biddle wrote the memorandum *after* blowing the whistle on Stanford, it says nothing regarding the duties Biddle labored under at the time he uncovered, investigated and disclosed Stanford's fraudulent conduct. Even if the memorandum could be given some legal effect, Biddle only acknowledges that he was to *prospectively coordinate and assist* while the DCAA *conducted* audits. Again, nothing in the memorandum required Biddle to ferret out fraud in the first instance.

Most importantly, nothing cited by Stanford required Biddle to continue "to do the audits he had been told were not his job, [tell] a committee of Congress what he had found, and trigger[] an investigation." Pet. App. at 26a (Kleinfeld, J., dissenting). Biddle acted voluntarily and without compulsion when he pursued his cause so vigorously.

V. Stanford's Argument That Biddle Ignores The Clearly Erroneous Standard Is A Red Herring – To The Contrary, Biddle's Argument Accepts The Trial Court's Findings Of Fact

Biddle does not "reargue[] the facts" in his Petition or "ignore[] the 'clearly erroneous' standard of review." Op. Br. at 18. In fact, Biddle's argument rests on the assumption that the trial court's findings regarding his job duties are correct and argues instead that the trial court erred in its application of the law to those facts. The trial court's determination that Biddle's job duties made his disclosure involuntary is a

jurisdictional, legal question, *see Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1472 (9th Cir. 1996), and the Ninth Circuit's affirmance of that determination is at issue, not whether the factual findings are "clearly erroneous."

The district court's opinion contains no factual finding that Biddle was required by his job to search for fraud, investigate the fraud despite opposition from his superiors, or pursue the fraud all the way to the United States Congress if all other channels presented dead ends. Stanford's suggestion that the FCA's requirement of disclosure to the Government "draws no distinction between branches of government," *see* Op. Br. at 20, misses the point. Biddle's testimony before Congress could only accurately be labeled involuntary if his job duties required such testimony. There is no finding to that effect in the trial court's opinion and the dissent directly discredits any such suggestion. *See* Pet. App. at 26a. Thus, even assuming that Biddle was compelled to disclose this information to his supervisors at ONR, that duty did not make his subsequent disclosures to Congress involuntary and that duty did not require Biddle's continued pursuit of the allegations on his own time and with his own money once his ONR supervisors failed to respond.

VI. Stanford Ignores Judge Kleinfeld's Dissent, The Obvious Import Of The Majority's Holding With Respect To Government Employees, And The Conflict Between The *Hagood* And *Fine* Holdings

Significantly, Stanford's brief never once mentions Judge Kleinfeld's dissent or his recognition that the majority opinion in *Biddle* effectively precludes all government employees from proceeding as *qui tam* relators and conflicts with the Ninth Circuit's holdings in *Hagood* and *Fine*. As Judge Kleinfeld acknowledges, the "evidence setting forth Biddle's job duties," Op. Br. at 19, demonstrates no greater a duty of disclosure on Biddle's part than Hagood's duty as a lawyer to "not knowingly assist in committing a fraud." App. at 26a (Kleinfeld, J., dissenting).

Stanford's bold assertion that an attorney's job "is limited in scope and does not include exposing fraud," Op. Br. at 21, defies logic, common sense, and the Rules of Professional Conduct. The idea that Biddle's duties as a contracting officer could somehow be more extensive than an attorney's duty to avoid assisting in the commission of fraud is equally specious.

The question Biddle asks this Court to address is simple – whether or not citizens who have some generalized duty to refer fraud to the Government, *i.e.*, all Government employees according to the language of Executive Order No. 12,674, should automatically be excluded from the pool of potential FCA relators under the "voluntary" test enunciated by the Ninth Circuit. Had that been Congress' intent, Congress could have expressly forbidden all Government employees from pursuing *qui tam* actions. *See* Pet. at 23-25. Rather than applying the plain statutory language, the Ninth Circuit has engrafted onto the FCA an additional exception to the courts' jurisdiction – that action is not judicial review but judicial governance.

VII. Stanford Fails To Distinguish *Dean* And The Legislative History Of The FCA

Stanford dismisses, in a footnote, Biddle's argument that the Ninth Circuit's interpretation of the voluntariness requirement conflicts with the statute's legislative history. *See* Op. Br. at 22 n.6. Stanford claims that the statutory duty at issue in *Dean* is somehow distinguishable from the regulatory job duties that Biddle labored under. Stanford suggests that Biddle would receive a windfall for merely doing his job while the state of Wisconsin in *Dean* could appropriately pursue an action since it was compelled to report fraud as a recipient of federal funds and not as an employee. This distinction is meaningless.

Federal law required Wisconsin to disclose instances of Medicare fraud to the United States Department of Health and

Human Services as part of the state's participation in the federal government's Medicare reimbursement program. *See United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984). Thus, in exchange for federal grant money, Wisconsin had a *duty* to "report various fraud and abuse information" to the Government. *Id.* at 1106. Therefore, Wisconsin would receive the very same "windfall" that Stanford and the Ninth Circuit find so offensive in this case – payment from the federal government for performance of a duty *and* recovery under the FCA as a result of those same disclosures. Neither Stanford nor the Ninth Circuit explain why the result in *Dean*, which Congress explicitly rejected in 1986, should now be given new life.

To the contrary, it is precisely because of the "perverse" decision in *Dean* that Congress acted in 1986 to amend the FCA. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1163 (3d. Cir. 1991) (Scirica, J., dissenting); *see also Findley*, 105 F.3d at 680 ("another defect" of the FCA before 1986 was the outcome of the *Dean* case). Any purported "windfall" to Biddle is not the issue in this case. The issue is whether or not Biddle is an appropriate *qui tam* relator under the terms of the FCA and whether or not he will be allowed to prosecute this action so that the Government can recoup lost taxpayer dollars.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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